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Colorado General Assembly

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MEMORANDUM

TO: Lance Wright and Dr. Alvin Otsuka

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: December 16, 2016

SUBJECT: Proposed initiative measure 2017-2018 #8, concerning Medical Aid in Dying

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. To add a new section 28a to Article II of the Colorado constitution proclaiming the rights of citizen-sovereigns to obtain medical aid in dying;

2. To declare that mentally competent, adult, lawful residents of the United States, referred to as "citizen-sovereigns," have the inalienable right of the liberty at life's end to set the time and tone of their own deaths by obtaining a medical professional's assistance in achieving a peaceful death through the careful administration of a medical protocol;
3. To proclaim that any person, group, or medical professional that assists a citizen-sovereign to secure medical aid in dying (MAID) is immune from criminal prosecution, civil liability, and professional discipline upon presenting acceptable documentation supporting the claim that the request for, and the rendering and utilization of, MAID was voluntary on the part of all involved in administering, or supporting the administration of, MAID;
4. To specify that a citizen-sovereign's right to obtain MAID is not limited to the maintenance of mental competency but can endure into incompetency if that is the citizen-sovereign's desire and if that desire is supported by written documentation of the conditions and terms of the conditional MAID agreement;
5. To permit a citizen-sovereign, at any time, to enter into a conditional MAID agreement under which a citizen-sovereign may receive MAID at a future date, when predetermined conditions are met, even though the citizen-sovereign may no longer be mentally competent;
6. To specify that MAID and conditional MAID are always voluntary, and agreement to participate in the MAID protocol can be withdrawn at any time by any citizen-sovereign involved;
7. To define terms used in the measure;
8. To specify that the measure, as written, is complete but that legislation to clarify the definition of the required documentation is permissible as long as the documentation clarification does not limit or restrict the provisions of the section or the powers granted in the measure; and
9. To make findings regarding the founding concepts of government, the characteristics of modern medicine, and philosophical and legal conflicts regarding the inability of Coloradans to access prescription drugs to provide a peaceful death.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Given that the voters recently approved proposition 106, adding article 48 to title 25, Colorado Revised Statutes, which would allow a terminally ill individual to seek and obtain medication to end his or her life:
 - a. What is the purpose of this measure?
 - b. How does this measure differ from article 48 of title 25, Colorado Revised Statutes, approved by the voters on November 8, 2016?
 - c. What impact will this measure have on article 48 of title 25? Since article 48 imposes requirements on a person seeking medical aid-in-dying medication, as well as on physicians prescribing the medication, and provides some safeguards against abuse, would this measure supersede, and essentially negate, those requirements and safeguards? What is the intended interplay between article 48 and this measure?
 - d. In subsection (3)(a)(I), the measure states that "Colorado law prevents a citizen-sovereign access to prescription drugs that would give him or her a peaceful death." With the enactment of article 48 of title 25, is this still an accurate statement?
3. The measure uses the term "citizen-sovereign." Do the proponents intend the term "citizen-sovereign" to equate to "sovereign citizens," as that term is used in what the federal bureau of investigation refers to as the "sovereign citizen movement" and that, in some cases, are classified by the FBI as domestic terrorists? Are the proponents concerned that the use of the term "citizen-sovereign" may be confused with "sovereign citizen" and the sovereign citizen movement?
4. It appears that the measure is establishing a right to MAID; however, the measure also states that participating in MAID is voluntary. Since MAID is a right, are medical professionals also able to withdraw from the agreement voluntarily or would there be the potential that this would be seen by the courts as violation of the citizen-sovereign's right to MAID?

5. Subsection (3) declares that "many Coloradans are surprised" to find out about certain aspects of Colorado law and that "many Coloradans believe" certain things about the law. Is there a source for these statements about Coloradans' knowledge and beliefs?
6. In subsection (4)(a):
 - a. Although the term "MAID" is defined in subsection (6)(f) as helping a citizen-sovereign "who has an incurable, life-limiting medical condition" obtain a peaceful death, the language in subsection (4)(a) does not reference the defined term "MAID" and does not restrict the right to obtain a medical professional's assistance to administer a medical protocol to achieve a peaceful death to a citizen-sovereign who has an incurable, life-limiting medical condition. Thus, it appears that under the language in subsection (4)(a), a citizen-sovereign who does not have an incurable, life-threatening medical condition could obtain a "medical protocol" to achieve death. Is that the proponents' intent? If not, would the proponents consider including the term "MAID" in subsection (4)(a) to ensure that only a person with an incurable, life-limiting medical condition can obtain a medical professional's assistance in administering a medical protocol to achieve death? Alternatively, the proponents could consider including the qualifying language "who have incurable, life-limiting medical conditions" after "citizen-sovereigns".
 - b. What is meant by the term "medical protocol"? Does the term refer only to medication, or does it include a set of actions by a physician or other medical professional?
 - c. Are there any penalties for failing to comply with the "careful administration of a medical protocol" language? What happens to unused medication or protocol tools? What are the safeguards so that the medication or equipment does not get into unauthorized hands?
 - d. Are there any limits on when or where the protocol can be administered? Can a citizen-sovereign use MAID to end his or her life in a public place? Who is responsible for removal of the body and who is responsible for related costs?
 - e. For purposes of insurance and death certificates, does the measure contemplate how this type of death would be recorded?

- f. Are there any Colorado residency requirements? It appears that under the measure, any lawful United States resident can come to Colorado and participate in MAID. Is that accurate? Is that the proponents' intent?
 - g. Since a person lawfully residing in the United States may not be a citizen, is it inconsistent to use the term "citizen-sovereign" when the measure does not appear to require a person to be a "citizen" to participate in MAID?
 - h. Would government agencies be required to provide access to or fund MAID drugs? For example, would the state have to supply MAID to inmates, veterans' homes residents, or other persons in state custody or who are on state health care plans like Medicaid?
 - i. Can a person on death row access MAID?
7. In subsection (4)(b):
- a. With regard to the phrase "MAID is voluntary on the part of all involved in administering, or supporting the administering of, MAID," does this phrase apply to the person "requesting" MAID? Would the proponents consider clarifying whether that phrase applies to the requesting person?
 - b. What constitutes "acceptable documentation" demonstrating that participation is voluntary? How would one determine whether the citizen-sovereign that obtained MAID was coerced?
 - c. If the general assembly were to pass legislation defining "acceptable documentation" that contained, for example, a requirement that the document be signed by two witnesses and notarized, would that be considered to "limit or restrict ... the powers ... granted" by the measure?
 - d. This language could be construed as providing immunity from prosecution if, at some point in time, the request for MAID was voluntary, but then the citizen-sovereign changed his or her mind but was coerced into using MAID to end his or her life. How does one know that when the protocol was administered the process was voluntary? Is the intent to provide blanket immunity regardless of the circumstances surrounding the actual death?
 - e. Is anyone responsible for gathering statistics on the use of MAID?

8. In subsection (5)(a), the term "written documentation" is used, but did the proponents mean "acceptable documentation" as defined in subsection (6)(a)?
9. In subsection (5)(b), the sentence permits a citizen-sovereign to enter into a conditional MAID agreement "to receive MAID." Should the word "conditional" be inserted to clarify that the agreement is to authorize "conditional MAID"?
10. In subsection (5)(c):
 - a. By what manner can a person withdraw from an agreement to participate in a procedure?
 - b. What is meant by the term "MAID protocol"? Is it the same as "medical protocol," as used in subsection (4)(a)? Is the intent that a person can withdraw from an agreement to participate in medical aid in dying?
 - c. Would the term "citizen-sovereign," as used in this provision, apply both to the person requesting medical aid in dying as well as a person who agreed to provide assistance?
11. In subsection (6)(f):
 - a. What types of medical conditions are contemplated by the phrase "incurable, life-limiting medical condition"? Does the medical condition have to be terminal?
 - b. Is the phrase "incurable, life-limiting medical condition" intended to restrict access to MAID to citizen-sovereigns who have an incurable, life-limiting medical condition? If so, would the proponents consider including that qualifier in the substantive provisions of the measure, possibly in subsection (4)(a), rather than in the definitions, where it may not be clear that it imposes a substantive restriction on who can access MAID?
 - c. What is a "medical protocol"? Can a "medical protocol" be as simple as a single injection of a specified drug, or must it involve more than that? Would the proponents consider defining this term? Must a medical professional administer a medical protocol?
12. With regard to the definition of "medical professional" in subsection (6)(g), would a pharmacist be able to administer MAID? Who is included in the definition of "medical professional"? Should the term be limited to medical professionals who have legal authority to prescribe medications?

13. What will be the effective date of the proposed initiative?
14. Since section 1-40-105.5, Colorado Revised Statutes, now requires the director of research of the legislative council to prepare and submit to the title board, the proponents, and the secretary of state an initial fiscal impact statement at the time of the title board hearing on the measure:
 - a. Will the proponents share their anticipated time frame for requesting a title board hearing?
 - b. If the proponents have any fiscal information they want considered in the development of the fiscal impact statement, will the proponents consider sharing that information with Kerry White with legislative council staff at kerry.white@state.co.us or 303.866.3469?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado constitution. Small capital letters are only used, however, for the actual text of the measure, but not for the section number or the headings or section divisions. So, for example:
 - a. "**Section 28a**" should appear in lowercase type.
 - b. Headings like "**Medical aid in dying**," "**Founding concepts of government**," "**Characteristics of modern medicine**," etc., should appear in lowercase, bold type and only the first letter of the first word of the headings should be capitalized.
 - c. Paragraph letter (c) in subsection (5) and paragraph letters (b), (c), and (i) in subsection (6) should be in lowercase type.

2. Although the text of the proposed initiative should be in SMALL CAPITAL LETTERS, use an uppercase letter to indicate capitalization where appropriate. The following should begin with a capital letter:
 - a. The first word of each sentence;
 - b. The first word of each entry of an enumeration paragraphed after a colon; and
 - c. Proper names.
 - i. In subsection (1), "declaration" and "independence" should not be capitalized;
 - ii. In subsection (6)(a), "documentation" should not be capitalized;
 - iii. In subsection (6)(f), in both the first and second sentences, the words "medical," "aid," and "dying" should not be capitalized; and
 - iv. In subsection (7), the word "section" should not be capitalized.
3. Although the section number (**Section 28a**) should be in bold type, subsection numbers should not be in bold. So, for example, (1), (2), (3), and subsequent subsection numbers should not be in bold type.
4. Articles in the Colorado constitution are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

Section __. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

5. The general rule is that if you only have one paragraph to include in a subsection, you do not label the language with a paragraph letter. So, for example:
 - a. Since subsection (1) and subsection (7) of the measure only consist of one paragraph, the paragraph letter "(a)" should be deleted in both of those provisions of the measure;
 - b. Additionally, since subsection (2) only contains a single paragraph that is subdivided, the paragraph label "(a)" following the heading **"Characteristics of modern medicine"** should be deleted, and the current paragraphs labeled "(I)" and "(II)" should be labeled as paragraphs "(a)" and "(b)," respectively.
6. In subparagraph (II) under subsection (2)(a), a comma should be inserted between "cured" and "and" to separate two independent clauses.
7. In subsection (3)(a)(II), it appears that the word "is" between "criminalizing" and "assisted" should be replaced with the word "as."
8. In subsection (6):
 - a. The period after (6) should be deleted.
 - b. The phrase "As used in this section" is not a sub-heading, it is an introductory phrase for the subsequent paragraphs. Therefore:
 - i. The phrase should not be in bold type;
 - ii. The words "used," "this," and "section" should not be capitalized; and
 - iii. The phrase should be followed by a colon rather than a period.
 - c. In paragraph (e), for consistency, the second use of the acronym "MAID" should be in capital letters, not lowercase.